THE HONORABLE ROBERT S. LASNIK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES LEE BURNS and MANDY N. BURNS, husband and wife, PAINLESS STEEL - EVERETT, LLC, a Washington corporation, and LACEY M. FILOSA, a single person and assignee, Plaintiffs, v. SCOTTSDALE INSURANCE COMPANY, a foreign insurance company, Defendant.	NO. 2:08-CV-01136-RSL SCOTTSDALE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT **NOTE FOR MOTION CALENDAR: APRIL 2, 2010** **ORAL ARGUMENT REQUESTED**

Scottsdale Insurance Company ("Scottsdale") moves for Summary Judgment in the claims brought by Plaintiff, Lacey Filosa, as an assignee of Painless Steel Everett, LLC ("Painless Steel") and James Lee and Mandy Burns, because the policy it issued to James Lee Burns does not cover Ms. Filosa's claimed losses. [1]

I. INTRODUCTION

In June 2005, Ms. Filosa brought suit in the Snohomish County Superior Court, against Painless Steel alleging that she was injured after having her tongue pierced. (Declaration of Jaime Allen ("Allen Decl.") Ex. 1, ¶ 3.1). That suit ultimately was settled for $3 million and an

[1] Ms. Filosa moved separately for Summary Judgment on the coverage issues, but does not address her Insurance Fair Conduct Act ("IFCA") claims. As the IFCA issues are likely moot in the absence of coverage, Scottsdale reserves this briefing for another day.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

assignment of Painless Steel and James Lee and Mandy Burns's rights in an insurance policy issued by Scottsdale Insurance Co.[2] (*Id.* ¶¶ 1.2, 4.3). Now, as the assignee of Painless Steel and the Burnses, Ms. Filosa brings the present action to collect the confessed judgment, and also alleges bad faith, and violations of the Washington Administrative Code, Washington Consumer Protection Act, and Washington Insurance Fair Conduct Act. (*Id.*).

II. MATERIAL UNDISPUTED FACTS

A. Mr. Burns Intentionally Leaves Painless Steel Bare of Insurance.

The entity that is today known as Painless Steel LLC, which was originally Painless Steel - Everett LLP, began leasing space in a four unit apartment building at 1807-1811 Broadway, Everett, Washington ("Subject Property") on or about August 9, 2001. (*Id.* Ex. 2). On or about November 30, 2001, Mr. Burns purchased the Subject Property in his personal capacity, leasing space back to Painless Steel and several other tenants. (*Id.* Exs. 3, 4, 5 at 28:2-4, 15-16, 19-21).

Although Mr. Burns and his partner discussed buying insurance for Painless Steel's business operations, they determined there was "pretty much nothing that would cover [them] on a professional standing that [they] could afford." (*Id.* Ex. 5 at 26:20-24; 27:5-13). Instead, they made a "business decision" to rely upon the corporate form, leaving their partnership bare of insurance. (*Id.* at 27:17-21).

B. Three and One-Half Years Later, Mr. Burns Purchased a "Lessor's Risk Only" Insurance Policy.

Scottsdale issued commercial general liability Policy No. CPS0491399 (the "Policy") to James Lee Burns for the period June 9, 2005 to June 9, 2006, to provide Lessor's Risk insurance coverage for himself as an "individual owner" of the Subject Property. (Declaration of Karen Dvorak ("Dvorak Decl.") ¶3-4); (Allen Decl. Ex 6).

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[2] A reasonableness hearing was held on April 11, 2008. Subsequently, Scottsdale sought to intervene. The Superior Court allowed Scottsdale to intervene after ruling that Ms. Filosa knowingly misrepresented that the labret was the source of her infection. Thereafter, a second reasonableness hearing was held on September 1-2, 2009. At the conclusion of the second reasonableness hearing, the court found the $3 million settlement reasonable. Scottsdale is presently appealing this determination.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Painless Steel was operating on the Subject Property when Mr. Burns obtained the Policy. (*Id.* Ex. 5 at 28:22-25). Yet, he understood: that he was purchasing insurance to cover the building he owned and himself personally (*Id.* at 31:1-6); that the operations being run in the building (including Painless Steel) were not covered (*Id.* at 31:7-12); that the Policy was "just separately building insurance. It [was] not for professional insurance" (*Id.* at42:19-21); and, that Painless Steel was not covered under the Policy for its piercing or tattooing services. (*Id.* at 32:2-6). Mr. Burns asked his insurance broker to obtain quotes for lessor's risk in his personal capacity. (*See Id.* Ex. 7). After procuring a quote from Scottsdale, the broker confirmed that:

> As for what it covers, it is just the liability associated with the building as the Lessor's Risk and the GL associated with the rental of the 2 units as well as the building itself. It doesn't contemplate any of the operations you may be running from that building. (*Id.* Ex. 7).

Prior to the underlying suit, Scottsdale was never aware that Mr. Burns owned Painless Steel. (Dvorak Decl. ¶ 5).

C. The Policy Insured Mr. Burns as the Owner of the Property.

1. The Policy repeatedly identifies Mr. Burns as an individual.

Mr. Burns is the only Named Insured on the Policy. (*Id.* Ex 6 at 00006). Painless Steel is not named as an insured or additional insured. (*Id.*). Throughout the Policy, Mr. Burns is identified as an individual - he lists himself on the declarations page as "an individual" (*Id.* at 00012) and the Policy declarations describes his business as a "property owner." (*Id.* at 00006).

2. Mr. Burns did not insure Painless Steel.

Mr. Burns is an experienced businessman with an ownership interest in multiple tattoo and piercing companies. (*Id.* Ex. 5 at 11:22-23; 12:20-25; 22:20-23). He also owns property in his personal capacity. (*Id.* at 28:2-4). Mr. Burns intentionally limited his liability by separating his personal and corporate property. (*Id.* at 22:3-13 (testifying that he incorporated Painless Steel "to protect [his] personal property")). He executed a Member Operating Agreement, and kept records of Painless Steel's regular member meetings. (*Id.* Exs. 8, 9). Mr. Burns even had

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Painless Steel lease space from him in his personal capacity. (*Id.* Ex. 4). According to the lease, "[t]he Landlord will not provide any insurance coverage for Tenant." (*Id.*). Further, the Lease recommends that Painless Steel obtain "[c]omprehensive general liability insurance against claims for bodily injury, including death, and property damage or loss arising out of the use or occupation of the Premises, or the Tenant's business on or about the Premises." (*Id.*) (emphasis added). Mr. Burns knew that Scottsdale would not cover any losses arising out of the operations of the tattooing and piercing business. (*Id.* Ex. 5 at 32:22-33:3). In contrast, the Lease required Mr. Burns, as the landlord, to keep the buildings insured against any loss by fire or other hazards. (*Id.* Ex. 4). He obtained the Policy for that purpose. (*Id.* Ex. 5 at 76:20-77:7). Thus, in the event of a large claim against one of his businesses, the worst thing that would happen is that that specific location would turn over its keys. (*Id.* at 22:8-13). Mr. Burns agreed that Scottsdale did not insure Painless Steel. (*Id.* at 32:2-6, 22-33:3).

3. The Policy Declarations describe Mr. Burns as a property owner.

The Policy Declarations describe Mr. Burns as a "property owner." (*Id.* Ex. 6 at 00006). Nowhere in the Policy is a tattoo or piercing business mentioned. (*See id.* Ex. 6). Further, the Supplemental Declarations to the Policy identify the form of business as an "individual." (*Id.* at 00012). The class descriptions are for "APARTMENT BUILDINGS" and "BUILDINGS OR PREMISES - BANK AND OFFICE MERCANTILE OR MANUFACTURING (LESSOR'S RISK ONLY)." (*Id.* at 00013).

4. The Policy does not insure the Burnses with respect to Painless Steel.

Section II "Who is an Insured" of the Policy provides that "if you are designated in the Declarations as…an individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner." (*Id.* Ex. 6 at 00021). However, this section is modified so that, "[n]o person or organization is an insured with respect to the conduct of any…limited liability company that is not shown as a Named Insured in the Declarations." (*Id.* at 00022).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

D. Lacey Filosa Brought Suit Against Painless Steel in June 2007.

On March 11, 2006, Lacey Filosa went to Painless Steel to have her tongue pierced. (*Id.* Ex. 12 at ¶2). Ms. Filosa had six other piercings and decided to get her tongue pierced because she "thought it was cool." (*Id.* Ex. 10 at 9:14-16;11:5-7; 13:16-18). Upon her arrival at Painless Steel, she completed an intake form acknowledging receipt of verbal and written "pre-service information" and agreed to hold harmless Painless Steel and Taylor Doose, the piercer who performed her piercing. (*Id.* Ex. 11). After Ms. Filosa signed the Hold Harmless Agreement, Mr. Doose inserted a metal barbell or "labret" into her tongue. (*Id.* Ex. 10 at 26:15-27:25). A few days later, she returned for the insertion of a shorter labret. (Id. Ex. 12, ¶ 6). The Burnses had no personal involvement in Ms. Filosa's services, and were not present at Painless Steel on either date. (*Id.* Ex. 5 at 44:24-45:5; Ex. 13 at 11:18-20).

On March 24, 2006 or March 25, 2006, Ms. Filosa began having "tooth pains." (*Id.* Ex. 10 at 44:6; Ex. 16). She visited two dentist and then went to the Emergency Room where she became very ill. (*Id.* Ex. 15, ¶2.3-2.4). Her treating physician, James Erhardt, M.D., concluded that bacteria in her own saliva washed through the hole in her tongue, causing the infection. (*Id.* Ex. 14 at 22:21-25). On June 15, 2007, Ms. Filosa, brought the underlying suit in the Snohomish County Superior Court, against Painless Steel and "John Does" (employees of Painless Steel, LLC [sic]) alleging damages "as a result of the surgical procedure to insert a tongue ring at Painless Steel LLC [sic]." (*Id.* Ex. 15).

E. The Burnses Repeatedly Informed Ms. Filosa During the Underlying Case that the Policy did not Cover Painless Steel's Business Operations.

Mr. Burns wrote to Ms. Filosa's counsel that "the company did not buy insurance." (*Id.* Ex. 16). Mr. Burns denied any coverage in his discovery responses. (*Id.* Ex. 5 at 38:19-39:6; Ex. 17 (stating in interrogatory responses that "Painless Steel - Everett, LLC does not have a liability insurance policy."); Ex. 18 (denying Ms. Filosa's RFA stating that "Defendant carried liability insurance for its premises at Painless Steel Tattooing & Body piercing at 1809 Broadway, Everett, WA 98201 on March 11, 2006"). And, Mr. Burns testified as Painless

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Steel's 30(b)(6) witness, in this case, that he stood by his interrogatory response. (*Id.* Ex. 5 at 38:19-39:6). Mr. Burns also explained to Ms. Filosa's attorney, that "[a]lthough we do not think this was caused by the company, please note that the company did not buy any insurance." (*Id.* Ex. 16). Mr. Burns's counsel doubted Ms. Filosa would "take on Scottsdale as its position that it owes no duty to defend this lawsuit is pretty sound." (*Id.* Ex. 19).

F. Ms. Filosa's Amended Complaint Added the Burnses "in their capacity as the sole owners of Painless Steel Everett LLC, not as individuals subject to personal liability."

In October 2007, Ms. Filosa amended her Complaint to add the Burnses, not in their personal capacities, but as sole owners of Painless Steel. In her motion to amend, she disavowed any intent to pursue their personal assets: "Painless Steel Everett LLC purposely operates bare of any insurance, so there is no liability insurance coverage for the business…[t]herefore, I have added James Lee Burns and his spouse in their capacity as the sole owners of Painless Steel Everett LLC, not as individuals subject to personal liability." (*Id.* Ex.20 at 2-3 (emphasis added); Ex. 21 at ¶ 3). The Second Amended Complaint was filed and added the Burnses "as sole owners of Painless Steel Everett LLC." (*Id.* Ex. 23 at ¶ 1.3).

G. Scottsdale Timely Responded to Each of its Insured's Tenders.

Scottsdale timely responded to the tenders made by the Burnses and Painless Steel's private counsel, Dylan Jackson. (Dvorak Decl. Exs. 1-4).

1. Scottsdale responded to Mr. Jackson's First Demand within 13 days.

On June 28, 2007, Mr. Jackson tendered to Scottsdale, forwarding the Complaint and Ms. Filosa's demand for policy limits. (*Id.* Exs. ¶5-6). Scottsdale received the documents on June 29, 2007. (*Id.* Ex. 1). By letter dated July 5, 2007, and sent on July 11, 2007, Scottsdale denied coverage because the Policy did not insure Painless Steel. (*Id.* Ex. 3).

2. Scottsdale responded to Mr. Jackson's Second Tender within 15 days.

On July 9, 2007, Ms. Filosa filed an Amended Complaint naming as Painless Steel and "John Does" (agents or employees of Painless Steel - Everett LLC) and correcting the

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

misspelling of "Painless Steel." (Allen Decl. Ex. 22). That Complaint did not allege claims against, or name, the Burnses. (*Id.*). On August 28, 2007, Mr. Jackson re-tendered the claim to Scottsdale based on the Amended Complaint. (Dvorak Decl. Ex. 4). On September 12, 2007, Scottsdale again denied the claim, stating that its coverage position remained unchanged. (*Id.* Ex. 5).

3. Scottsdale responded to Mr. Jackson's Third Tender within 1 day.

On October 1, 2007, Ms. Filosa moved to file a Second Amended Complaint adding, *inter alia*, "James Lee Burns and his spouse, Mandy N. Burns, as sole owners of Painless Steel - Everett LLC." (Allen Decl. Ex. 23 at ¶ 1.3). Mr. Jackson re-tendered to Scottsdale. (Dvorak Decl. Ex. 6). On October 2, 2007 Scottsdale responded that its coverage position remained unchanged. (*Id.* Ex. 7).

4. Scottsdale responded to Mr. Jackson's Fourth Tender within 7 days.

When the Court granted Ms. Filosa's motion to amend her Complaint on October 11, 2007, Mr. Jackson re-tendered the claim to Scottsdale by letter dated the same day. (*Id.* Ex. 8). The letter was received on October 16, 2007. (*Id.*). On October 23, 2007, Scottsdale again denied the claim because the Policy expressly provided that "no person is an insured with respect to the conduct of any. . . limited liability company that is not shown as a Named Insured in the Declarations." (*Id.* Ex. 9).[3] Scottsdale later reiterated its denial in a letter sent to Mr. Jackson on December 7, 2007. (*Id.* Ex. 12).

III. ISSUES PRESENTED

1. Does Scottsdale owe a duty to defend and/or indemnify where the Policy did not provide coverage and clearly excluded Ms. Filosa's claims?

2. Did Scottsdale act in good faith by timely denying its insured's tender for defense

[3] Scottsdale also responded timely to a policy limits demand from Ms. Filosa's counsel, dated October 26, 2007. (Dvorak Decl. Ex. 10). Scottsdale referred this matter to its coverage counsel and responded denying Ms. Filosa's demand on December 7, 2007 and reiterating its coverage position. (*Id.* Ex. 11).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

and indemnity, when its Policy did not provide coverage and clearly excluded Ms. Filosa's claims?

3. Did Scottsdale follow the Consumer Protection Act by denying coverage when its Policy did not provide coverage and clearly excluded Ms. Filosa's claims?

IV. EVIDENCE RELIED UPON

1. Declaration of Jaime Allen with attached Exhibits 1 - 26;

2. Declaration of Karen Dvorak with attached Exhibits 1-12.

2. The statements, materials and pleadings on file with the Court, and all exhibits attached hereto.

V. ARGUMENTS AND AUTHORITY

The "interpretation of language in an insurance policy is a matter of law" for the Court to decide. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). When, as here, the material facts are not disputed, summary judgment is appropriate. *See McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 730-31 837 P.2d 1000, 1003 (1992).

A. Scottsdale has no Duty to Defend, Because the Policy did not Cover Ms. Filosa's Claims.

Mr. Burns did not buy an insurance policy to cover Painless Steel or its operations, and the Policy should not now be interpreted to have a meaning that it was not intended or understood to have when it was created. "[T]he duty to defend hinges not on the insured's potential liability to the claimant, but rather on whether the complaint contains any factual allegations rendering the insurer liable to the insured under the policy." *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 486, 687 P.2d 1139 (1984). "When coverage is clearly inapplicable to the facts alleged in the complaint, the insurer has no duty to defend." *Id.* Ms. Filosa's Second Amended Complaint alleges facts and events outside the scope and intent of the Policy - Painless Steel is not insured, the Burnses are not insured as to Painless Steel's

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

operations, and the Policy excludes allegations under the bacteria/fungi and professional services exclusions.

1. Ms. Filosa, as an assignee of Painless Steel and the Burnses, cannot meet either prong of the *McDonald* test to establish coverage.

An insurance policy is construed as a contract. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). It is considered as a whole and given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* at 666. When the policy language is clear and unambiguous, it is enforced as written and courts cannot modify or create an ambiguity where none exists. *Quadrant Corp. v. Am. States Ins.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). The Policy clearly and unambiguously excludes coverage for Ms. Filosa's allegations.

To determine whether there is coverage under a commercial general liability policy, Washington courts use a two-step process - *first,* the insured must show that its loss falls within the scope of the losses insured under the policy; and, then only after this showing is made; *second*, the insurer must show that the loss is excluded by specific policy language to avoid coverage. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). Under the first step, the insured must establish who is insured, the type of risk insured against, and the existence of the insurance contract. *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 164, 52 P.2d 494 (2002). "[E]stablishing that a policy is in effect is not the same as establishing there is coverage." *Id.* The Policy does not meet either prong of this test.

a. Ms. Filosa cannot establish coverage.

The Policy issued to James Lee Burns, as a landlord of a four unit apartment building, did not provide coverage for the operations of Painless Steel, one of the building's tenants. "CGL policy holders like [plaintiff] have purchased a general liability policy, not a performance bond, product liability, or malpractice insurance." *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000) (internal quotations and citations omitted). "[A]s a private contractor,

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

the insurer may place limitations on certain policy provisions without violating a statute or public policy." *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995). Inherently, "[a]n insurer is free to limit its risks by excluding coverage when the nature of its risk is altered by factors not contemplated by it in computing premiums." *Id.*

(1) Painless Steel and the Burnses "in their sole capacity as owners of Painless Steel" are not insureds under the Policy.

Plaintiff cannot meet the first part of the *McDonald* test because Painless Steel is not an "insured" under the Policy and the Burnses are not insureds with regards to the conduct of Painless Steel. Section II of the Policy identifies "Who is an Insured." (Allen Decl. Ex. 6 at 00021).

> **SECTION II – WHO IS AN INSURED**
>
> 1. If you are designated in the Declarations as:
>
> a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
>
> b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
>
> c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

Section II of the Policy continues,

> ~~3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:~~
>
> ~~a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;~~

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

~~b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and~~

~~c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.~~

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

(Allen Decl. Ex. 6 at 00022) (strike out added per Exclusion - New Entities, *Id.* at 00031).

The Policy Declarations unambiguously identified the insured as "Lee Burns." (*Id.* at 00012). Under the "who is an insured" definition, and before reading the Policy any further, Mr. Burns and Mrs. Burns would be insured with respect to the conduct of a business of which Mr. Burns is the sole owner. (*Id.* at 00021). However, Section II is modified by the last paragraph in the section stating that "[n]o person or organization is an insured with respect to the conduct of any current or past partnership, joint venture, or limited liability company that is not shown as a Named Insured in the Declarations." (*Id.* at 00022). In Ms. Filosa's Second Amended Complaint, she specifically added the Burnses "in their capacity as the sole owners of Painless Steel…not as individuals subject to personal liability." (*Id.* Ex. 23 at ¶ 1.3). Thus, the Burnses are not insured "with respect to the conduct" of Painless Steel, because Painless Steel is not shown as a named insured in the declarations and because the Burnses were named in the suit only under their capacity as owners in Painless Steel.

Ms. Filosa has argued that the conduct of a limited liability company is not excluded because that paragraph modifies only Section II(3), directly above it which is deleted by the New Entities Endorsement. (*Id.* Ex. 6 at 00031). But, a plain reading of Section II, including looking at the placement of text throughout the section and the margins, makes it unarguably clear that

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

the last paragraph of Section II modifies the entire section. Thus, the "No person…" paragraph applies to all of Section II, not just to the paragraph 3.[4]

(2) ***Painless Steel's operations were not the "type of risk to be insured."***

Ms. Filosa also fails to meet the first prong of the *McDonald* test because Painless Steel's operations were not the "type of risk to be insured." The Policy was issued to Lee Burns as an individual with the type of risk being insured described in the business description as a "Property Owner." (Allen Decl. Ex. 6 at 00006). The property being insured was "APARTMENT BUILDINGS" and "BUILDINGS OR PREMISES - BANK AND OFFICE MERCANTILE OR MANUFACTURING (LESSOR'S RISK ONLY)." (*Id.* at 00013). The Policy does not mention Painless Steel, any piercing or tattoo parlor, or any business operations of Mr. Burns's aside from him owning the Subject Property. The description limits the buildings or premises to "lessor's risk only," making it clear that the insurance was not covering the operations of the businesses occupying the building. (*Id.*). Further confirming that the Policy covers only Mr. Burns as landlord, is the exclusionary language discussed above providing that "[n]o person or organization is an insured with respect to conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declaration" (*Id.* at 00022). Upon accepting the Policy, Mr. Burns agreed that the statements in the Declarations were accurate, based on representations made by him to the insurance company, and that Scottsdale had relied on those representations in issuing the Policy. (*Id.* Ex. 6 at 00006). Scottsdale cannot now be held to provide coverage where none exists under the plain language of the Policy.

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[4] Throughout the Policy, the placement of the text in other sections shows that it is the placement of the text that is determinative of what the text applies to, for example, the introductory language of the Policy beginning with "[v]arious provisions in this policy restrict coverage…" is set to the side, in line with all the Section headings, as it applies to the entire Policy. (Allen Decl. Ex. 6 at 00014). Conversely, when the Policy intends for a paragraph to apply only to the section preceding it, that paragraph is in line with the section to which it applies, for example, the paragraph following Section I(1)(a)(2) applies to all of Section I(1). (*Id.*).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

b. Mr. Burns and Scottsdale never intended to insure Painless Steel or its operations.

In addition to the actual language of the Policy, voluminous evidence supports that Mr. Burns and Scottsdale never intended to bind coverage for Painless Steel's operations. Washington courts have repeatedly recognized that the primary goal of construing an insurance policy is to give effect to the parties' intent. *See e.g., Weyerhaeuser*, 142 Wn.2d at 669 ("primary goal is to discern the intent of the parties and such intent must be discovered from viewing the contract as a whole."). Courts attempt to ascertain what was probably contemplated by the parties when the contract was written. *Harris v. Fireman's Fund Indem. Co.*, 42 Wn.2d 655, 664, 257 P.2d 221 (1953). Accordingly, in determining whether an insurance contract applies to a given loss, a court evaluates whether the parties *intended* that contract would apply. *See Aetna Inc. Co. v. Kent*, 85 Wn.2d 942, 946, 540 P.2d 1383 (1975) ("[t]he intention of the parties…must control concerning the coverage provided."). The parties' intent is determined at the time they entered the contract, not the interpretations advocated by the parties years later, after a claim is made and litigation commenced. *See e.g. Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 689, 871 P.2d 251 (1987). The undisputed facts show that Mr. Burns and Scottsdale did not intend to cover Painless Steel. *See* § V(A)(1) *supra.*

In similar situations, where a policy only covered certain aspects of a business or certain operations, courts have held that no coverage existed. In *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Northwest Youth Svcs.*, 97 Wn. App. 226, 232, 983 P.2d 1144 (1999), when a general liability policy covered the named insured and its employees in the scope of their work, the court held that it was reasonable to conclude that the parties did not intend to cover claims arising out of sexual misconduct of a therapist "since such malpractice claims represent a significant and identifiable risk to the insurer." Similarly here, the Policy covered only the physical buildings on the Subject Property, and not the operations occurring inside them because that would have been a significant and identifiable risk to Scottsdale for which it would have either chosen not to issue the Policy or charged much higher premiums.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Also, the Washington Court of Appeals held in *Unigard*, 97 Wn. App. 417, 983 P.2d 1155 (1999), that there was no coverage for an individual when a lawsuit named only a company and not the individual. The court reasoned that the complaint against the company, "even if construed liberally, does not trigger [the insurer's] duty to investigate a potential personal claim against [the individual]." *Unigard v. Leven*, 97 Wn. App. at 425. In this case, none of the parties against whom Ms. Filosa brings suit are covered under the Policy. Even if construed liberally, there is no coverage for Painless Steel because it is not an insured, and there is similarly no coverage for the Burnses in their capacity "as sole owners" of Painless Steel because the Policy language specifically excludes coverage for individual insureds "with respect to the conduct of any…limited liability company that is not shown as a Named Insured in the Declarations." (Allen Decl. Ex. 6 at 00022).

(1) Mr. Burns purposefully did not insure Painless Steel.

Scottsdale limited its risk by not insuring Painless Steel or its operations. Mr. Burns admits that Painless Steel was never an insured of Scottsdale. (*Id.* Ex. 5 at 32:3-6, 22-3).[5] In fact, Mr. Burns purposefully chose not to insure Painless Steel because "pretty much nothing that would cover [them] on a professional standing that [they] could afford." (*Id.* at 26:20-27:13). He made a "business decision" to rely upon Painless Steel's corporate form, leaving it bare of insurance, and instead relying "on the limited liability of the company as opposed to relying on insurance to protect the business." (*Id.* at 27:17-21; *see also* Ex. 20 at 2) ("Painless Steel Everett LLC purposefully operates bare of any insurance, so there is no other liability insurance coverage available for the business."). Painless Steel was operating intentionally bare of insurance. (*See id.*). Approximately one month after obtaining the Policy for building insurance,

[5] Q: And we discussed earlier that Painless Steel - Everett, LLC was never an insured of Scottsdale Insurance Company --
MR. MOORE: Object to the form.
Q: -- is that correct?
A: That's correct.
(Allen Decl. Ex. 5 at 65:22-66:2).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

and knowing that Painless Steel was not insured under the Policy, Mr. Burns incorporated Painless Steel as a limited liability company "to protect [his] personal property." (*Id.* Ex. 5 at 22:3-13).

(2) Mr. Burns purchased a Lessor's Risk Policy to cover the Subject Property.

Mr. Burns purchased a Lessor's Risk policy to cover the Subject Property from Scottsdale, not a policy to cover Painless Steel or its operations. (*Id.* Ex. 5 at 32:2-6, 22-33:3). Mr. Burns is the only named insured on the Policy and is identified as an individual throughout the Policy. (Allen Decl. Ex. 6 at 00006). The Policy is issued to Mr. Burns as the owner/lessor of the apartment and commercial rentals. (*Id.* at 00013). Mr. Burns is an experienced businessman who intentionally separated his personal and business property so that if there was a large claim against one of his businesses, then, "the worst thing that would happen is that that location would need to basically turn over the keys." (*Id.* Ex. 5 at 22:3-13). Mr. Burns understood the decision he was making:

> Q: Did you understand in receiving this quote that the insurance that you would be purchasing would cover your building and you in your personal capacity only?
> MR. JACKSON: Object to the form.
> A: Yes.
> Q: Did you understand in receiving this quote that the insurance that you would be purchasing if you went ahead and bought this would not cover operations being run on the building?
> MR. MOORE: Object to the form.
> A: Yes.
> Q: And at the time that you received this quote, Painless Steel - Everett, LLP was running operations from the building?
> A: Yes.
> Q: And with this letter you would understand that if Painless Steel - Everett, LLP would have had a mishap and been sued that you would not be able to look to the insurance policy that was going to be provided by this quote to cover Painless Steel - Everett, LLP?
> MR. MOORE: Object to the form.
> MR. JACKSON: Object to the form.
> A: Yes, in the capacity of tattooing or piercing itself.
> Q: So you understood that the insurance policy that you were contemplating buying at that moment would not cover tattooing or piercing, correct?

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

MR. MOORE: Object to the form.
A: Right. Just the building.
(*Id.* Ex. 5 at 31:132:6) (emphasis added).

Furthermore, the broker who Mr. Burns worked with to obtain the Policy, explained that it covered "just the liability associated with the building as the Lessor's Risk and the GL associated with the rental of the 2 units as well as the building itself. It doesn't contemplate any of the operations you may being run from that building." (*Id.* Ex. 7). Mr. Burns confirmed that he understood that the Policy was "just separately building insurance" and "not for professional insurance." (*Id.* Ex. 5 at 42:19-21).

2. **Even if Mr. Burns is covered under the Policy, specific Policy language excludes his claims.**

Where, as here, the policy exclusion clearly and unambiguously applies to bar coverage, the court's inquiry ends. *Scottsdale Ins. Co. v. Int'l Protective Agency*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). Ms. Filosa, as an assignee of Painless Steel and the Burnses, fails to satisfy the first step of the *McDonald* test, because the alleged loss does not fall within the scope of losses insured under the Policy. Regardless, under the second *McDonald* factor, Ms. Filosa's alleged losses are excluded from the Policy.

a. The Fungi/Bacteria Exclusion excludes Ms. Filosa's claims.

The Policy does not apply to bodily injury "which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any 'fungi' or bacteria on or within a building or structure, including its contents…" (Allen Decl. Ex. 6 at 00049, 00050). Ms. Filosa alleges, in her Second Amended Complaint, that she contracted "flesh eating bacteria" from a contaminated labret (barbell) used to pierce her tongue. (*Id.* Ex. 23 ¶ 2.4). The plain language of the Policy excludes her claim as it alleges that a deadly bacteria, that was within Painless Steel's building or on the contents therein, contaminated the barbell.

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Ms. Filosa argues that the labret was a good or product intended for "consumption," and thus falls under the exclusion's exception that "[t]his exclusion does not apply to any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for consumption." (*Id.* Ex. 6 at 00050). However, a labret is not a good or product intended for *consumption.* According to accepted dictionary definitions, "consumption" can mean either: (1) a progressive wasting away of the body especially from pulmonary tuberculosis; (2) the act or process of consuming; or, (3) the utilization of economic goods in the satisfaction of wants or in the process of production resulting chiefly in their destruction, deterioration, or transformation. *Webster's Third New International Dictionary, Unabridged*, http://www.merriam-webster.com/dictionary/consumption. Neither of the three definitions apply to the present situation. A federal court in Georgia held that water in a hot tub is a good or product intended for consumption because it met the third definition and was intended for the "utilization...in the satisfaction of wants." *Nationwide Mutual Fire Ins. Co. v. Dillard House, Inc.*, 651 F.Supp.2d 1367 (N.D. Ga. 2009). However, *Dillard House*, is entirely distinguishable from the present suit because water in a hot tub is expected to be consumed. Quite simply, the water is flushed out after use. In other words it is used and then disposed of afterwards. Therefore, it is destroyed, deteriorates, or is transformed. Here, the labret is never consumed, it never changes form, and it is never digested or ingested by the body - in short, it is never meant for consumption. Additionally, undefined terms are given "their plain, ordinary, and popular meaning as would be understood by the average insurance purchaser." *Wheeler v. Rocky Mtn. Fire & Cas. Co.*, 124 Wn. App. 868, 872, 103 P.3d 240 (2004). It strains common usage and language to assert that a labret is intended for "consumption," under the Policy. Thus, the exception to the exclusion does not apply and the fungi/bacteria exclusion precludes coverage under the Policy.

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

b. Ms. Filosa's claims were excluded under the Professional Services Exclusion.

Ms. Filosa's piercing is a "professional service" excluded under the Professional Services Exclusion in the Policy. *See Hollingsworth v. Commercial Union Insurance*, 208 Cal.App.3d 800, 256 Cal. Rptr. 357 (Cal. App. 1989). The Professional Services Exclusion provides that "[t]his insurance does not apply to 'bodily injury'...due to the rendering of...any professional service." (Allen Decl. Ex.6 at 00030). The exclusion for the Policy specifically excludes "any and all professional exposures." (*Id.*) (emphasis added).

In *Hollingsworth*, a California case that is directly on point and with facts strikingly similar to the present case, a cosmetic store tendered its defense to its business insurer when a customer sued it and its owner for damages allegedly caused by the store's employee negligently piercing the customer's ear. *Hollingsworth v. Commercial Union Ins.*, 208 Cal.App.3d 800, 256 Cal. Rptr. 357 (1989). When the insurer denied coverage under the policy's professional services exclusion, the store filed suit arguing that ear piercing was not a professional service because it required no special training or skill. *Id.* at 803, 807. The policy at issue provided basic property and liability coverage to the sole proprietor and owner of the business. *Id.* at 805. The court evaluated the claim for coverage under the "professional services" "in light of all the relevant circumstances in which that claim arises, including but not limited to, the term's commonly understood meaning, the type and cost of the policy, and the nature of the enterprise." *Id.* at 806. The court held that in the context of a cosmetics business, ear piercing "was a 'professional' service both in the sense that it constituted an aspect of the cosmetics sales professional and that it was done for and in anticipation of some form of financial gain." *Id.* at 809. "Professional services" are not limited to learned professions but instead are generally activities "done for remuneration as distinguished from a mere pastime." *Id.* at 807; *see also, Amex Assurance Co v. Allstate Ins.*, 112 Cal.App.4th 1246, 1252, 5 Cal. Rptr. 3d 744 (2004) (coverage excluded under professional services exclusion when a plumber with homeowner's insurance allegedly improperly installed a water heater at his friends' house that caused a fire).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

The fact that the Policy is a landlord lessor's policy and that its premiums are consistent with that type of policy, rather than a general liability policy, support the application of the professional services exclusion. *See* §V(A)(2) *supra*; *see also Hollingsworth*, 208 Cal.App.3d at 808. The "relatively low premium also underscores the limited nature of the coverage and dispels any reasonable expectation that it would extend to the type of injury suffered here." *Hollingsworth,* 208 Cal.App.3d at 808. Mr. Burns had previously looked into obtaining insurance for Painless Steel and concluded that it was too costly. Thus, he "should have understood that the premium charged reflected a reasonable perception that [his] normal business activities did not include any potentially injurious procedure." *Id.* at 810. In fact, Mr. Burns expressly informed Ms. Filosa that Painless Steel did not buy insurance. (Allen Decl. Ex. 16). Moreover, the Policy clearly contemplates insuring Mr. Burns as an apartment owner, not as the owner of a tattoo and piercing parlor - in fact, Scottsdale was never told about Painless Steel from Mr. Burns. *See* §C *supra*. Like in *Hollingsworth*, the injury to Ms. Filosa "did not arise from any deficiency in the premises, such as a slippery floor or unsafe fixture, but from a separate and distinct service..." *Hollingsworth*, 208 Cal.App.3d at 808. The Professional Services Exclusion plainly, clearly, and unambiguously excludes coverage for the piercing services, and by extension, for Ms. Filosa's allegations. Simply put, the court "may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated." *Id.*

Finally, in *Harris v. Fireman's Fund Indem. Co.*, 42 Wn.2d 655, 257 P.2d 221 (1953), the Washington Supreme Court held that under a professional services exclusion in an "Owners', Landlords' and Tenants' public liability policy" issued to a osteopathic physician, coverage was not provided when a patient who was injured when the treatment table collapsed. *Harris*, 42 Wn.2d at 658-59. Aside from the plain language of the exclusion, the denial of coverage was further supported because the policy covered "ordinary risks incidents [sic] to the occupancy of a commercial building" and the premium charged was consistent with a policy covering the building not its professional operations. *Id.* at 665; *Cf. Aetna Ins. Co. v. Kent*, 85 Wn.2d 942,

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

947, 540 P.2d 1383 (1975) (holding that "the gross disparity in premium costs is clear evidence" that the policies "were not intended to provide the same coverage but rather were intended to provide mutually exclusive coverage.").

Thus, under both *Hollingsworth* and Washington law supporting it, body piercing is a professional service excluded under the Policy. Coverage for the Burnses and Painless Steel is barred entirely under this exclusion.

B. Because There is no Coverage Under the Policy, Scottsdale does not have a Duty to Indemnify its Insured.

Scottsdale neither had a duty to defend its insured, nor to indemnify it, because the Policy does not provide coverage. "The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy." *Hayden*, 141 Wn.2d at 64. As more fully explained above, Scottsdale had no duty to defend or indemnify because its policy only covered risks associated with the premises, and not Painless Steel or the Burnses as related to Painless Steel. *See* §V(A) *supra*. Had Scottsdale intended to insure Painless Steel, it may have elected to not offer insurance, or to charge much higher premiums that one might expect for a high risk business such as a piercing and tattoo parlor. *See* §V(A)(2)(b) *supra*. Moreover, the bacteria and professional services exclusions barred coverage under the Policy. *See* § V(A)(2) *supra*.

C. Scottsdale did not act in Bad Faith.

1. Scottsdale promptly denied Mr. Burns's tenders and did not violate WAC 284-30-330.

Private counsel for Painless Steel and the Burnses made separate tenders to Scottsdale, each one of which was responded to promptly. *See* § II(G) *supra*. Scottsdale was required to "adopt and implement reasonable standards for the prompt investigation" of a claim. *See* WAC 284-30-330(3). For each of the tenders, Scottsdale promptly investigated the claims and issued its denials with reasons for the denial. *See* § II(G) *supra*. The WACs further require that Scottsdale had to investigate a claim "within thirty days after notification" of the claim "unless such investigation cannot reasonably be completed within such time." *See* WAC 284-30-370.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

On each of the tenders, Scottsdale responded to the tender in less than 30 days and met its obligations under WAC 284-30-370. *See* § II(G) *supra*.[6]

2. Scottsdale acted honestly and in good faith in denying Mr. Burns's tender when it reasonably concluded that no coverage existed for Painless Steel under the Policy.

The undisputed facts show that Scottsdale did not misrepresent pertinent facts or insurance policy provisions. *See* WAC 284-30-330(1). Courts look at the "reasonableness of the insurer's actions in light of all the facts and circumstances of the case." *Shields v. Enterprise Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007). Scottsdale gave reasons for each of its denials. (Dvorak Decl. Exs. 3, 5, 7, 9, 12). It reasonably investigated the claims before denying them. *See* WAC 284-30-330(4). By promptly responding to each tender and providing reasons for its denials, Scottsdale acted reasonably and complied with Washington regulations. *See* § II(G) *supra*.

Moreover, "[i]n order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998); *see also St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008). While Scottsdale vigorously maintains that the Policy does not provide coverage, even if it is found to provide coverage, the mere fact that Scottsdale denied the claims does not show that Scottsdale acted in bad faith. Insurers "are going to make some mistakes." *Coventry Assoc. v. Amer. States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998). "As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a *good* faith mistake." *Id.* (emphasis in original). As explained herein, Scottsdale's denials were reasonable based on the Policy language and are supported by legal authority. Mr. Burns admitted that he did not buy insurance for Painless Steel

[6] Scottsdale also timely responded to Ms. Filosa's October 26, 2007 policy limits demand on December 7, 2007. (Dvorak Decl. Exs. 6-7).

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

and knew that the Policy did not cover Painless Steel's operations. *See* § II(C) *supra*. Mr. Burns's attorney told him that he doubted Ms. Filosa would "take on Scottsdale as its position that it owes no duty to defend this lawsuit is pretty sound." (Allen Decl. Ex. 19). Bad faith will not be "found where a denial of coverage or a failure to provide a defense is based upon a reasonable interpretation of the insurance policy." *Kirk*, 134 Wn.2d at 560. Without a showing of bad faith, "[t]he failure to defend...does not constitute bad faith, trigger a presumption of harm, or allow coverage by estoppel." *Id.* at 560-61. Alleged claims which "are clearly not covered by the policy relieve the insurer of its duty." *Id.* at 561. Scottsdale evaluated the Policy, came to a reasonable conclusion that it did not provide coverage for Ms. Filosa's allegations, and promptly notified its insured. *See* § II(G) *supra*.

D. Scottsdale did not Violate the Washington Consumer Protection Act.

Ms. Filosa can prove a Consumer Protection Act ("CPA") violation one of two ways, either (1) allege the five elements required under *Hangman Ridge*;[7] or, (2) show that "the alleged act constitutes a *per se* unfair trade practice.[8] *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 786, 719 P.2d 531 (1986). As discussed above, Scottsdale did not violate the WACs or any statutes, therefore, Ms. Filosa cannot claim a *per se* violation of the CPA. *See Rizzuti v. Basin Travel Svc. of Othello, Inc.*, 125 Wn. App. 602, 621-22, 105 P.3d 1012 (2005) (plaintiff could not show violations of the WACs as related to insurance, therefore, there was no CPA violation).

[7] To prevail in a private action under the Washington Consumer Protection Act ("CPA"), a plaintiff must allege and prove "five distinct elements: (1) an unfair or deceptive act; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); RCW 19.86.020. A lack of proof on any one element defeats a CPA claim. *Id.* at 795. "Whether a particular action gives rise to a violation of the CPA is reviewable as a question of law." *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 560, 825 P.2d 714 (1992).

[8] To establish a *per se* violation, Plaintiff must allege and prove: "(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect." *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 471, 128 P.3d 621 (2005). While violations of the WACs regarding insurance constitute a per se unfair practice, there were no such violations. *See Rizzuti*, 125 Wn. App. at 621.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Thus, Ms. Filosa must meet the five-factor *Hangman Ridge* test to establish a CPA violation. She cannot meet these criteria because Scottsdale did not engage in any unfair or deceptive practices when it fairly interpreted the Policy to not provide coverage. "A reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the Consumer Protection Act." *Shields*, 139 Wn. App. at 676 (internal quotations and citations omitted). "[A]cts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Id* (internal quotations and citations omitted); *see also Ins. Co. of the State of Penn. v. Highlands Ins. Co.*, 59 Wn. App. 782, 786-87, 801 P.2d 284 (1990) ("[n]either denial of coverage because of a debatable coverage question nor delay, unaccompanied by an unfounded or frivolous reason, constitutes bad faith."). As evidenced by the arguments and authority asserted herein, Scottsdale acted in good faith by denying its insured's tender based on the plain language of the Policy and established legal precedent.

Moreover, Ms. Filosa's CPA claims are void because she made material misrepresentations in the process of her action. (Allen Decl. Ex. 26). In *Kim v. Allstate Insurance Co, Inc.*, 2009 WL 4043373, Slip Op. No. 37256-8II, (Wn. Ct. App. Div. II, Nov. 24, 2009), the Washington Court of Appeals held that an insurer could not have acted in bad faith or in violation of the CPA when the insured "knowingly and intentionally misrepresented" her ability to work after her accident and the nature and extent of her injuries. *Id.* at *10 (granting summary judgment to insurance company when the misrepresentations were material to plaintiff's claims). Ms. Filosa, as an assignee of Painless Steel and the Burnses, has made numerous misrepresentations throughout this process, including that (1) she procured the first reasonableness determination by making knowing misrepresentations regarding the sole evidence of proximate cause; (2) she represented to the Court that she would not pursue the Burnses in their personal capacities and would not recover against their personal assets, but has now changed her position (Allen Decl., Exs. 20 at 2-3, Ex. 21 at ¶ 3, Ex. 23 at ¶ 1.3); and, (3) she

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1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

has changed her theory of how the labret became contaminated - first alleging that it was "contaminated" and changing the fault to an "ungloved hand" theory, after her expert physician debunked her initial theory of infection.[9] Therefore, because Ms. Filosa has made material misrepresentations during this process, any bad faith or CPA violation against Scottsdale is negated.

VI. CONCLUSION

Scottsdale should not now be responsible for the defense and/or indemnity of Ms. Filosa's claims when the Policy simply does not cover them. By the insured's own admission, the Policy was never intended to cover Painless Steel, or its operations. Moreover, Scottsdale acted with good faith and was timely in responding to its insured's tenders and requests. For the aforementioned reasons, Scottsdale Insurance Company respectfully asks the Court to grant Summary Judgment in its favor as to Ms. Filosa's claims as an assignee of Painless Steel and the Burnses for (1) violations of the Consumer Protection Act, RCW 19.86 *et. seq.*; (2) violations of RCW 48.01.030; and (3) violations of WAC 284-30-330, thereby dismissing with prejudice Plaintiff's suit against Scottsdale Insurance Company, as to these claims. A Proposed Order is attached hereto.

DATED this 9th day of March, 2010.

OGDEN MURPHY WALLACE, P.L.L.C.

By /s Jaime Allen
Geoff J. M. Bridgman, WSBA #25242
Jaime Drozd Allen, WSBA #35742
Attorneys for Scottsdale Insurance Company

[9] There is not a single reference to an ungloved hand in the Second Amended Complaint, Settlement Agreement, written discovery, witness disclosures, or expert opinions. (*Id.* Ex. 23, Ex. 24 at 22:24-23:4, Ex. 25).

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2010 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

William Barker Sonnenschein Nath & Rosenthal, LLP 7800 Sears Tower 233 South Wacker Drive Chicago, IL 60606-6404	X _____ _____ _____	CM/ECF Facsimile U.S. Mail Messenger
David B. Huss Law Office of David B. Huss 21907 64th Avenue West Suite 370 Mountlake Terrace, Washington 98043	X _____ _____ _____	CM/ECF Facsimile U.S. Mail Messenger
Dylan E. Jackson Wilson Smith Cochran Dickerson 1215 Fourth Avenue Suite 1700 Seattle, Washington 98161	X _____ _____ _____	CM/ECF Facsimile U.S. Mail Messenger
Ray W. Kahler Strittmatter Kessler Whelan Coluccio 200 Second Avenue West Seattle, WA 98119-4204	X _____ _____ _____	CM/ECF Facsimile U.S. Mail Messenger
Brad Moore Strittmatter Kessler Whelan Coluccio 200 Second Avenue West Seattle, Washington 98119	X _____ _____ _____	CM/ECF Facsimile U.S. Mail Messenger

DATED this 9th day of March 2010, at Seattle, Washington.

s/ Jaime D. Allen
Jaime D. Allen, WSBA #35742

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215